

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DAVID CHACON,  
Plaintiff,  
v.  
ONTARIO POLICE DEPARTMENT, et  
al.,  
Defendants.

Case No. EDCV 17-1520 VBF (SS)

**MEMORANDUM DECISION AND ORDER:**

(1) DISMISSING COMPLAINT WITH  
LEAVE TO AMEND, AND

(2) DENYING WITHOUT PREJUDICE  
PLAINTIFF'S REQUEST FOR  
APPOINTMENT OF COUNSEL

I.

## INTRODUCTION

22 David Chacon ("Plaintiff"), a California state prisoner  
23 proceeding pro se, has filed a complaint alleging violations of  
24 his civil rights pursuant to 42 U.S.C. § 1983. ("Complaint," Dkt.  
25 No. 1). Congress mandates that district courts perform an initial  
26 screening of complaints in civil actions where a prisoner seeks  
27 redress from a governmental entity or employee. 28 U.S.C.  
28 § 1915A(a). This Court may dismiss such a complaint, or any

1 portion, before service of process if it concludes that the  
2 complaint (1) is frivolous or malicious, (2) fails to state a claim  
3 upon which relief can be granted, or (3) seeks monetary relief from  
4 a defendant who is immune from such relief. 28 U.S.C. § 1915A(b) (1-  
5 2); see also Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir.  
6 2000) (en banc). For the reasons stated below, the Complaint is  
7 DISMISSED with leave to amend.<sup>1</sup> Plaintiff's Request for Appointment  
8 of Counsel in the prayer for relief is DENIED without prejudice.

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10 **II.**

11 **ALLEGATIONS OF THE COMPLAINT**

12  
13 Plaintiff sues (1) the Ontario Police Department and four of  
14 its employees, Patrol Officers (2) Matthew E. Zick, (3) Edward  
15 Flores, and (4) Brennan Falconieri, and (5) Sergeant James  
16 Renstrom. (Complaint at 2). The Complaint does not indicate  
17 whether the individual Defendants are sued in their individual or  
18 official capacities.

19  
20 Plaintiff alleges that upon exiting his vehicle during a  
21 routine traffic stop on November 25, 2016, he was tased twice by  
22 Officer Zick, who failed to tell Plaintiff what Officer Zick wanted  
23 him to do. (Id. at 3). Plaintiff blacked out and awoke three and  
24 a half hours later at the Chino Medical Center. (Id.). Plaintiff  
25 was "extremely battered" from the encounter with police and had a  
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27 <sup>1</sup> Magistrate judges may dismiss a complaint with leave to amend  
28 without approval of the district judge. See McKeever v. Block,  
932 F.2d 795, 798 (9th Cir. 1991).

1 broken left wrist. (Id.). Upon his release from the hospital,  
2 Plaintiff was booked in the West Valley Detention Center in San  
3 Bernardino County on charges of "felony evading" and "obstruction  
4 of justice." (Id.).

5

6 Zick testified at Plaintiff's preliminary hearing that he  
7 tased Plaintiff approximately four times and struck him twelve  
8 times with his baton. (Id.). According to the complaint, Zick  
9 further testified that Plaintiff was "unconscious and unresponsive"  
10 during the beating. (Id.). Plaintiff claims that in addition to  
11 a broken wrist, he suffered permanent nerve damage in his neck and  
12 continues to have mobility issues "as a result of denial of therapy  
13 and treatment." (Id.).

14

15 The Complaint raises claims under the Fourth and Eighth  
16 Amendments, presumably for excessive force and deliberate  
17 indifference to serious medical needs. (Id.). Plaintiff seeks  
18 "monetary damages," "medical care/treatment for life," and an  
19 injunction relieving all of the officers who were involved in the  
20 incident of their duties and subjecting them to criminal sanctions.  
21 (Id. at 6). Plaintiff further requests that counsel be appointed,  
22 and that leave be granted permitting him to amend his Complaint  
23 following the appointment of counsel. (Id.).

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III.

## DISCUSSION

4 Under 28 U.S.C. section 1915A(b), the Court must dismiss  
5 Plaintiff's Complaint due to multiple pleading defects. However,  
6 the Court must grant a pro se litigant leave to amend his defective  
7 complaint unless "it is absolutely clear that the deficiencies of  
8 the complaint could not be cured by amendment." Akhtar v. Mesa,  
9 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and internal  
10 quotation marks omitted). Accordingly, for the reasons stated  
11 below, the Complaint is DISMISSED with leave to amend.

**A. The Ontario Police Department Is An Improper Defendant**

15 Plaintiff purports to sue the Ontario Police Department.  
16 (Complaint at 2). To gain relief under section 1983, a plaintiff  
17 must plead: "(1) a violation of rights protected by the  
18 Constitution or created by federal statute, (2) proximately caused  
19 (3) by conduct of a 'person' (4) acting under color of state law."  
20 Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991). However,  
21 a police department is not a "person" for the purposes of a section  
22 1983 action. See Hervey v. Estes, 65 F.3d 784, 791 (9th Cir. 1995)  
23 (police narcotics task force not a "person" or entity subject to  
24 suit under section 1983); United States v. Kama, 394 F.3d 1236,  
25 1239 (9th Cir. 2005) (Ferguson, J., concurring) (local government  
26 departments and bureaus are generally not considered "persons"  
27 within the meaning of section 1983). Accordingly, the Ontario

1 Police Department is not a proper defendant in this action, and  
2 Plaintiff's claims against the Department must be dismissed.  
3

4 **B. Plaintiff Fails To State A Claim Against The City Of Ontario**  
5 **Or San Bernardino County**

7 While a department, agency or unit of a local government is  
8 an improper defendant in a section 1983 action, there is "no  
9 constitutional impediment to municipal liability" under the Civil  
10 Rights Act. Monell v. Dep't of Soc. Servs. of City of New York,  
11 436 U.S. 658, 690 n.54 (1978); see also Pembaur v. City of  
12 Cincinnati, 475 U.S. 469, 483 n.12 (1986) (applying Monell's  
13 analysis of municipal liability to counties). However, a local  
14 government may not be held responsible for the acts of its employees  
15 simply because it employed the person or persons who caused the  
16 plaintiff harm. Monell, 436 U.S. at 691. To assert a valid section  
17 1983 claim against a city or county, a plaintiff must show not only  
18 a deprivation of a constitutional right, but also that the city or  
19 county had a policy, custom or practice that was the "moving force"  
20 behind the constitutional violation. Villegas v. Gilroy Garlic  
21 Festival Ass'n, 541 F.3d 950, 957 (9th Cir. 2008). There must be  
22 a "'direct causal link between a [city or county] policy or custom  
23 and the alleged constitutional deprivation.'" Id. (quoting City  
24 of Canton v. Harris, 489 U.S. 378, 385 (1989)).

25  
26 "Proof of a single incident of unconstitutional activity is  
27 not sufficient to impose liability under Monell, unless proof of  
28 the incident includes proof that it was caused by an existing,

1 unconstitutional municipal policy, which policy can be attributed  
2 to a municipal policymaker." Okla. City v. Tuttle, 471 U.S. 808,  
3 823-24 (1985); see also Gant v. Cnty. of Los Angeles, 772 F.3d 608,  
4 618 (9th Cir. 2014) (quoting same). Rather, liability must be  
5 "founded upon practices of sufficient duration, frequency and  
6 consistency that the conduct has become a traditional method of  
7 carrying out policy." Trevino v. Gates, 99 F.3d 911, 918 (9th Cir.  
8 1996).

9

10 It is unclear whether Plaintiff intended to sue the City of  
11 Ontario for the policies and practices of the Ontario Police  
12 Department, the County of San Bernardino for the policies and  
13 practices of the San Bernardino County Sheriff's Department (which  
14 operates the West Valley Detention Center), or both, or neither.  
15 Even if Plaintiff had identified a proper governmental Defendant,  
16 he does not allege a policy, custom or practice of either the City  
17 or the County that led to his alleged injuries. As a result,  
18 Plaintiff fails to state a valid Monell claim against either the  
19 City of Ontario or San Bernardino County. Accordingly, the  
20 Complaint must be dismissed, with leave to amend.

21

22 **C. Plaintiff Fails To State A Claim Against Flores, Falconieri**  
23 **And Renstrom**

24

25 The Complaint names Officers Flores and Falconieri and  
26 Sergeant Renstrom as Defendants. (Complaint at 2). However, the  
27 Complaint does not contain a single allegation explaining what any  
28 of these officers did to cause harm to Plaintiff.

1       To allege a civil rights violation against an individual  
2 defendant, a plaintiff must show either direct, personal  
3 participation in the alleged violation or, in the case of  
4 supervisory personnel, some sufficient causal connection between  
5 the official's conduct and the alleged constitutional violation.  
6 See Starr v. Baca, 652 F.3d 1202, 1205-06 (9th Cir. 2011).  
7 Plaintiff must allege specific facts showing what each individual  
8 Defendant did to violate his constitutional rights. See Ashcroft  
9 v. Iqbal, 556 U.S. 662, 676 (2009) (holding that a complaint must  
10 include specific facts for a plausible claim). Accordingly,  
11 Plaintiff's claims against Defendants Flores, Falconieri and  
12 Renstrom must be dismissed, with leave to amend.

13

14 **D. Plaintiff Fails To State A Claim For Deliberate Indifference**  
15 **To Serious Medical Needs**

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17       Plaintiff claims that he suffered permanent nerve damage in  
18 his neck and continues to have mobility issues "as a result of  
19 denial of therapy and treatment." (Complaint at 3). Although he  
20 does not identify which specific Defendants were responsible for  
21 his medical care or what exactly those Defendants did or did not  
22 do, it is possible that Plaintiff may be attempting to state a  
23 claim based on his allegedly inadequate medical care. To show that  
24 the inadequate treatment rises to the level of a constitutional  
25 violation, a prisoner must demonstrate that he had a "serious  
26 medical need" to which the defendant was "deliberately  
27 indifferent." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006);  
28 see also West v. Atkins, 487 U.S. 42, 49 (1988).

1       To establish a "serious medical need," a plaintiff must  
2 demonstrate that "failure to treat a prisoner's condition could  
3 result in further significant injury or the 'unnecessary and wanton  
4 infliction of pain.'" Jett, 439 F.3d at 1096 (citation omitted).  
5 To establish "deliberate indifference" to a serious medical need,  
6 a plaintiff must demonstrate: "(a) a purposeful act or failure to  
7 respond to a prisoner's pain or possible medical need, and (b) harm  
8 caused by the indifference." (Id.). Deliberate indifference "may  
9 appear when prison officials deny, delay or intentionally interfere  
10 with medical treatment, or it may be shown by the way in which  
11 prison physicians provide medical care." (Id.) (citations  
12 omitted). The defendant must have been subjectively aware of a  
13 serious risk of harm to Plaintiff and consciously disregarded that  
14 risk. See Farmer v. Brennan, 511 U.S. 825, 828 (1994).

15  
16       Plaintiff alleges that he has continuing pain in his neck and  
17 mobility issues but did not describe any injuries to his neck, legs  
18 or back that occurred during the incident. Furthermore, he does  
19 not identify which Defendant(s) knew of these injuries and what  
20 exactly they did or did not do despite that knowledge that caused  
21 Plaintiff harm. The Complaint does not state a claim for deliberate  
22 indifference to serious medical needs. Accordingly, the Complaint  
23 must be dismissed, with leave to amend.

24  
25 **E. The Complaint Violates Federal Rule of Civil Procedure 8**

26  
27       Federal Rule of Civil Procedure 8(a)(2) requires that a  
28 complaint contain "'a short and plain statement of the claim

1 showing that the pleader is entitled to relief,' in order to 'give  
2 the defendant fair notice of what the . . . claim is and the  
3 grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly,  
4 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)). Rule 8  
5 may be violated when a pleading "says too little," and "when a  
6 pleading says too much." Knapp v. Hogan, 738 F.3d 1106, 1108 (9th  
7 Cir. 2013) (emphasis in original).

8

9       Here, the Complaint violates Rule 8 because Plaintiff does  
10 not clearly identify the nature of each of the legal claims he is  
11 bringing, the specific facts giving rise to each claim, or the  
12 specific Defendant or Defendants against whom each claim is  
13 brought. Without more specific information, Defendants cannot  
14 respond to the Complaint. See Cafasso, U.S. ex rel. v. Gen.  
15 Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011) (a  
16 complaint violates Rule 8 if a defendant would have difficulty  
17 understanding and responding to the complaint). Furthermore,  
18 Plaintiff's request that the Court take "judicial notice" of Case  
19 No. 16 CR-066544 in the Superior Court of California, Rancho  
20 Cucamonga District, is confusing and unnecessary. (Complaint at  
21 3). Plaintiff does not state who the Defendant was in that case  
22 or what the proceedings involved. Nor does he identify the order,  
23 testimony or part of the proceedings of which he wishes the Court  
24 to take notice, or explain why notice is relevant here.  
25 Accordingly, the Complaint must be dismissed, with leave to amend.

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1       **F. It Is Unclear Whether Plaintiff Has "Effectively Exhausted"**  
2       **His Administrative Remedies With Respect To His Deliberate**  
3       **Indifference Claim**

5           Plaintiff affirmatively states in the Complaint that he did  
6 not file a grievance relating to his claims. (Complaint at 3).  
7 Plaintiff explains that he "was advised that if [he] filed [a]  
8 complaint or [requested] sanctions[, he] would be subject to  
9 further force and/or retaliation." (Id.).

10  
11           The Prison Litigation Reform Act of 1995 (the "PLRA"), 42  
12 U.S.C. § 1997e(a), requires a prisoner to exhaust all available  
13 administrative remedies before suing over prison conditions in  
14 federal court. Booth v. Churner, 532 U.S. 731, 733-34 (2001); see  
15 also 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until  
16 such administrative remedies as are available are exhausted.").  
17 "[F]ederal courts may not consider a prisoner's civil rights claim  
18 when a remedy was not sought first in an available administrative  
19 grievance procedure." Panaro v. City of North Las Vegas, 432 F.3d  
20 949, 954 (9th Cir. 2005). A prisoner must pursue a remedy through  
21 all levels of the prison's grievance process "as long as some  
22 action can be ordered in response to the complaint," Brown v.  
23 Valoff, 422 F.3d 926, 934 (9th Cir. 2005), regardless of the  
24 ultimate relief offered through such procedures. Booth, 532 U.S.  
25 at 741.

1       While exhaustion is normally a precondition to suit, the PLRA  
2 does not require exhaustion "when circumstances render  
3 administrative remedies 'effectively unavailable.'" Sapp v.  
4 Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010). Generally, to fall  
5 within an exception to the exhaustion requirement, "a prisoner must  
6 show that he attempted to exhaust his administrative remedies but  
7 was thwarted." Sapp, 623 F.3d at 823-24); see also Albino v. Baca,  
8 747 F.3d 1162, 1172 (9th Cir. 2014) (administrative remedies may  
9 be effectively unavailable where filing a grievance would be  
10 "'ineffective, unobtainable, unduly prolonged, inadequate, or  
11 obviously futile'" (quoting Hilao v. Estate of Marcos, 103 F.3d  
12 767, 778 n.5 (9th Cir. 1996)).

13

14       "[T]he PLRA does not require that a prisoner's federal court  
15 complaint affirmatively plead exhaustion." Nunez v. Duncan, 591  
16 F.3d 1217, 1223-24 (9th Cir. 2010) (citing Jones v. Bock, 549 U.S.  
17 199, 212-17 (2007)). Failure to exhaust is an affirmative defense  
18 that requires the defendant, following service of the complaint,  
19 to prove that "the prisoner did not use existing and generally  
20 available administrative remedies." Albino, 747 F.3d at 1172.

21

22       A prisoner-plaintiff is not required to exhaust administrative  
23 remedies with respect to a claim that arresting officers used  
24 excessive force against him prior to his incarceration. See  
25 Holston v. DeBranca, 2011 WL 666880, at \*5 (E.D. Cal. Feb. 11,  
26 2011) (citing cases); Perez v. Bell, 2012 WL 1532291, at \*2 (D.  
27 Ariz. May 1, 2012) ("[B]ecause the alleged excessive force occurred  
28 during [plaintiff's] arrest and prior to any incarceration, there

1 was no requirement to exhaust remedies [under the PLRA].").  
2 However, Plaintiff is cautioned that if he failed to avail himself  
3 of the prison grievance process before filing this lawsuit for any  
4 claims that involve events occurring after his incarceration,  
5 Defendants may raise the failure to exhaust as an affirmative  
6 defense and may seek dismissal of any unexhausted claims.

7

8 **G. The Request For Appointment Of Counsel Is Denied Without**  
9 **Prejudice**

10

11 Plaintiff asks the Court to appoint counsel because he is  
12 indigent. (Complaint at 6). Plaintiff is advised that there is  
13 no constitutional right to appointed counsel in a civil action,  
14 including a civil rights action under section 1983. See Palmer v.  
15 Valdez, 560 F.3d 965, 970 (9th Cir. 2009). The decision to appoint  
16 counsel is within "'the sound discretion of the trial court and is  
17 granted only in exceptional circumstances.'" Agyeman v.  
18 Corrections Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004)  
19 (quoting Franklin v. Murphy, 745 F.2d 1221, 1236 (9th Cir. 1984)).  
20 When deciding whether exceptional circumstances exist, the court  
21 must evaluate both "'the likelihood of success on the merits [and]  
22 the ability of the petitioner to articulate his claims pro se in  
23 light of the complexity of the legal issues involved.'" Palmer,  
24 560 F.3d at 970 (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331  
25 (9th Cir. 1986)).

26

27 Plaintiff bears the burden of demonstrating the existence of  
28 "exceptional circumstances" warranting the appointment of counsel.

1       Palmer, 560 F.3d at 970. To the extent that Plaintiff's request  
2 is based on his indigency or any other difficulties of his  
3 incarceration, including his limited legal knowledge, Plaintiff  
4 fails to establish "exceptional circumstances" required for the  
5 appointment of counsel as these conditions and limitations apply  
6 to almost every inmate. See Tilton v. Brown, 2013 WL 3804583, at  
7 \*3 (E.D. Cal. July 19, 2013) ("Circumstances common to most  
8 prisoners, such as lack of legal education and limited law library  
9 access, do not establish exceptional circumstances that would  
10 warrant a request for voluntary assistance of counsel."); Cardwell  
11 v. Kettelhake, 2010 WL 3636267, at \*1 (E.D. Cal. Sept. 14, 2010)  
12 (plaintiff's failure to complete high school, his alleged  
13 difficulty responding to pleadings and understanding procedural  
14 rules, and his limited access to the law library do not establish  
15 "exceptional circumstances" warranting appointment of counsel as  
16 they are "experience[s] common to many prisoners").

17  
18       The Court believes that Plaintiff presently has the ability  
19 to articulate his claims without the assistance of counsel.  
20 Neither the facts nor the legal issues involved in this case appear  
21 to be unusually complex. Plaintiff's challenges in representing  
22 himself therefore do not appear, at this stage of the litigation,  
23 to pose an insurmountable obstacle to the pursuit of his claims.  
24 See Palmer, 560 F.3d at 970 (trial court did not abuse discretion  
25 in denying motion for appointment of counsel where inmate plaintiff  
26 demonstrated an ability to represent himself at trial).

27  
28

1 Accordingly, Plaintiff's Motion for Appointment of Counsel is  
2 DENIED WITHOUT PREJUDICE. Nothing in this Order is intended to  
3 preclude Plaintiff from retaining counsel on his own.

4

IV.

6

## CONCLUSION

7

8 For the reasons stated above, the Complaint is DISMISSED with  
9 leave to amend. The request for appointment of counsel is DENIED  
10 without prejudice.

11

12           If Plaintiff still wishes to pursue this action, he is granted  
13 **thirty (30) days** from the date of this Memorandum and Order in  
14 which to file a First Amended Complaint. In any amended complaint,  
15 the Plaintiff shall cure the defects described above. **Plaintiff**  
16 **shall not include new defendants or new allegations that are not**  
17 **reasonably related to the claims asserted in the original**  
18 **Complaint.** The First Amended Complaint, if any, shall be complete  
19 in itself and shall bear both the designation "First Amended  
20 Complaint" and the case number assigned to this action. It shall  
21 not refer in any manner to any previously filed complaint in this  
22 matter.

23

24 In any amended complaint, Plaintiff should confine his  
25 allegations to those operative facts supporting each of his claims.  
26 Plaintiff is advised that pursuant to Federal Rule of Civil  
27 Procedure 8(a), all that is required is a "short and plain statement  
28 of the claim showing that the pleader is entitled to relief."

1 Plaintiff is strongly encouraged to utilize the standard civil  
2 rights complaint form when filing any amended complaint, a copy of  
3 which is attached. In any amended complaint, Plaintiff should  
4 clearly identify the nature of each separate legal claim, the  
5 Defendant or Defendants he believes are liable for each claim, and  
6 the facts showing what each Defendant did to cause Plaintiff harm.  
7 Plaintiff is strongly encouraged to keep his statements concise  
8 and to omit irrelevant details. It is not necessary for Plaintiff  
9 to cite case law, include legal argument, or attach exhibits at  
10 this stage of the litigation. Plaintiff is also advised to omit  
11 any claims for which he lacks a sufficient factual basis.

12

13 Plaintiff is explicitly cautioned that failure to timely file  
14 a First Amended Complaint, or failure to correct the deficiencies  
15 described above, will result in a recommendation that this action  
16 be dismissed with prejudice for failure to prosecute and obey court  
17 orders pursuant to Federal Rule of Civil Procedure 41(b).  
18 Plaintiff is further advised that if he no longer wishes to pursue  
19 this action, he may voluntarily dismiss it by filing a Notice of  
20 Dismissal in accordance with Federal Rule of Civil Procedure  
21 41(a)(1). A form Notice of Dismissal is attached for Plaintiff's  
22 convenience.

23

24 DATED: December 11, 2017

25

26 /S/  
27 SUZANNE H. SEGAL  
28 UNITED STATES MAGISTRATE JUDGE

## **NOTICE**

THIS DECISION IS NOT INTENDED FOR PUBLICATION IN LEXIS, WESTLAW OR  
ANY OTHER LEGAL DATABASE.